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88-5014

Nos. 88-5014
88-5158

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOSE GOMEZ, DIEGO CHAVEZ-TESINA,
WILLIAM SALAZAR and BEIMAR VALLEJO, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

SUPPLEMENTARY PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Does the Federal Magistrates Act authorize a district judge, over a criminal defendant's objection, to delegate jury selection in a felony trial to a magistrate while reserving authority to review de novo the magistrate's rulings on challenges for cause?

II. Does a district judge's delegation of jury selection to a magistrate, with reservation of de novo review authority concerning unsuccessful defense challenges for cause, violate a felony defendant's Article III and Due Process rights?

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Petitioners, Jose Gomez, Diego Chavez-Tesina, William Salazar and Beimar Vallejo, respectfully request that a Writ of Certiorari be issued to review a judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-captioned proceeding on June 1, 1988 (petition for rehearing en banc denied August 4, 1988).[1]

The circuit court's 2-1 decision (Oakes, C.J., dissenting) affirmed petitioners' narcotics-related convictions despite their statutory and constitutional objections to jury selection by a magistrate in place of an

1 Petitioners Jose Gomez, No. 88-5014, and Diego Chavez-Tesina, No. 88-5158, previously filed pro se petitions for certiorari and motions to proceed in forma pauperis. As explained in Gomez's motion to defer consideration of his petition dated August 11, 1988, Gomez proceeded pro se in the mistaken belief that, due to lack of additional funds, his retained attorney would not file a petition. Chavez-Tesina acted under the same misapprehension. By letter dated September 2, 1988, the Solicitor General agreed that deferral was warranted until this supplemental petition was filed.

Article III judge. Petitioners were convicted after a jury trial in the United States District Court for the Eastern District of New York before the Honorable Joseph M. McLaughlin, District Judge. Jury selection was held before Magistrate A. Simon Chrein.

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Second Circuit are reported at 848 F.2d 1324, entitled United States v. Garcia, and are reprinted in the appendix hereto at pp. 1a-15a. The court's denial of the petition for rehearing en banc appears in the Appendix at 16a.

The United States District Court for the Eastern District of New York (McLaughlin, D.J.) wrote no opinion in this case. The transcript of proceedings relevant to the district court's decision to proceed with jury selection by the magistrate, and appellants' objections thereto, is reproduced in the appendix at 17a-23a, infra.

JURISDICTION

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Article III, Section 1 of the United States Constitution:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The Fifth Amendment to the United States Constitution (in pertinent part):

> No person shall be ... deprived of life, liberty, or property, without due process of law ...

Title 28, United States Code, Section 636 (in pertinent part):

> **§ 636. Jurisdiction, powers, and temporary assignment.**
>
> (a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment --
>
> * * *
>
> (3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.
>
> (b)(1) Notwithstanding any provision of law to the contrary --
>
> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.
>
> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

* * *

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary --

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves....

Rule 1 of the Rules for Proceedings Before Magistrates in the Southern and Eastern Districts of New York:

Jurisdiction - 28 U.S.C. Section 636

Full-time magistrates shall have jurisdiction to discharge the duties set forth in 28 U.S.C. Sec. 636.

STATEMENT OF THE CASE

Prior to jury selection in this criminal trial on February 9, 1987, petitioners Gomez, Salazar and Chavez-Tesina, through counsel, objected on statutory and constitutional grounds to the district judge's delegation of jury selection to a magistrate.[2] Nevertheless, after consulting the district judge, the magistrate proceeded with voir dire and selected a panel. On February 17, 1987, Salazar repeated petitioners' objection to Judge McLaughlin, who denied it after offering de novo review of the magistrate's determination of defense challenges for cause. Petitioners declined this offer, the only juror challenged for cause having been excused by the magistrate. United States v. Garcia, 848 F.2d at 1327.

On February 27, 1987, petitioners were convicted by their magistrate-selected jury of narcotics-related charges and subsequently were sentenced to varying terms of imprisonment.[3]

In their appeal, petitioners argued that Congress did not intend the Federal Magistrates Act, Pub.L. No. 90-578, 82 Stat. 1107, reprinted in 1968 U.S. Code Cong. & Admin. News 1280 (codified as amended at 28 U.S.C. §§ 631-639 (1982 & Supp. III 1985)), to authorize magistrates to conduct jury selection in felony trials. Petitioners pointed out that Congress had specifically delineated the pre-trial proceedings and, upon consent, civil and misdemeanor criminal trials which a magistrate may conduct, but nowhere authorized a magistrate to conduct any part of a felony trial. The 1968 Magistrate Act's principal sponsor,

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2 Counsel for Vallejo did not object.

3 The total sentences of imprisonment were as follows: Gomez (10 years), Chavez-Tesina (15 years), Salazar (15 years), and Vallejo (7 years).

Sen. Joseph Tydings, explicitly testified that Congress did not intend to permit a magistrate to conduct a felony trial. Thus, the statute's additional "catch-all" provision, § 636(b)(3), which authorizes a magistrate to "be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States," could not be construed to authorize voir dire delegation. Finally, petitioners maintained that, even if Congress had intended to permit magistrates to conduct felony voir dire, a district judge's delegation of such authority to a non-Article III officer, particularly over the defendant's objection, violates both Article III and the Due Process Clause of the Fifth Amendment.

The government responded in its brief that Congress did in fact intend the "catch-all" provision to permit federal judges to delegate jury selection to magistrates. Citing several supportive cases, including United States v. Ford, 797 F.2d 1329 (5th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 964 (1987), the government argued that the de novo review procedure adopted ad hoc by the district court sufficiently safeguarded petitioners' constitutional right to a trial before an Article III judge.

Prior to oral argument of this appeal, the Fifth Circuit, sitting en banc, voted 10 to 4 to reverse the Ford panel and to hold that the Magistrates Act did not authorize delegation of jury selection to a magistrate, even with a reservation by the district judge of de novo review authority. Judge Higginbotham's majority opinion, joined by eight of his colleagues, stated that an opposite construction would raise "grave constitutional issues." United States v. Ford, 824 F.2d 1430, 1435 (5th Cir. 1988) (en banc). However, because Ford had not objected to the procedure in the District Court, the en banc court again

affirmed the conviction.

Although the United States opposed Ford's petition for certiorari due to Ford's district court "waiver," the government conceded that magistrate-conducted jury voir dire "is an important issue that will likely warrant review by this Court in an appropriate case..." Brief for the United States in Opposition to the Petition for Certiorari, Ford v. United States, Docket No. 87-5570, at 12. While the Court denied certiorari, Mr. Justice White dissented, reasoning as follows:

> If the decision below is []correct, and this use of the magistrate violates either the Act or the Constitution, then it is not obvious that this violation can be dismissed under the "plain error" doctrine. And the position of the Fifth Circuit on this issue conflicts with two decisions of the Ninth Circuit. United States v. Peacock, 761 F.2d 1313, 1317-1319 (CA9), cert. denied, 474 U.S. 847 (1986); United States v. Bezold, 760 F.2d 999, 1001-1003 (CA9 1985), cert. denied, 474 U.S. 1063 (1986). See also United States v. Rivera-Sola, 713 F.2d 866, 872-873 (CA1 1983) (dictum). The split among the Circuits on this issue warrants our granting certiorari.

Ford v. United States, ___ U.S. ___, 108 S.Ct. 741, 742 (1988)(Justice White dissenting from the denial of certiorari).

Taking direct issue with Ford, the Second Circuit in this case upheld the procedure for jury selection employed in the District Court against petitioners' statutory and constitutional attacks. Without discussing petitioners' citations to the legislative history, the court held that Congress had intended § 636(b)(3)'s "catch-all" provision to be "broad in scope and unrestricted by 'any other specific grant of authority to magistrates.'" United States v. Garcia, 848 F.2d at 1329. Similarly, the court rejected petitioners' Article III claim, reasoning that the district court's reservation of de novo review authority sufficiently

safeguarded petitioners' individual, Article III rights. Id. at 1331-32. Distinguishing the decisions of this and other courts stressing the fundamental importance of the voir dire process to a fair trial, the Court stated: "[E]ven if we accept appellant's premise that an Article III judge must preside over a trial, it does not necessarily follow that for purposes of Article III trial begins with jury selection." Id. at 1332. The court did not specifically address the petitioners' Due Process Clause claim.

In his dissent, Judge Oakes took issue with the majority's narrow view of the voir dire process. That process, Judge Oakes noted, implicates the defendant's rights to due process, equal protection, an impartial jury, assistance of counsel, and a speedy trial; it "provides the foundation upon which the remainder of the trial is built." Id. at 1337 (Oakes, C.J., dissenting). He continued:

> Intending no offense toward magistrates, delegation demeans the process, making it appear essentially clerical in nature. At the very least it impedes the judge from personally instilling in the jury at the start of the trial a sense of the importance of the work the jury is about to perform. It is apt to make the jury less attentive to the judge during the trial, and the judge less sensitive to the problems of the individual jurors, as well as to the overall chemistry of the jury itself. For due process also demands, as well as a disinterested jury, "a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." Smith v. Phillips, [455 U.S. 209, 217 (1982)]. Events can occur during the magistrate's voir dire that would require the judge's review, but he would be disadvantaged because they occurred outside his presence. In addition, a defendant might feel short-changed, and left with the impression that he, and his case, are of lesser consequence because the judge himself did not participate....

Id. at 1337-38.

Rather than forbidding magistrate-conducted jury selection altogether, as the Fifth Circuit did in Ford, Judge Oakes advocated prohibiting the practice under the court's supervisory power, except "possibly" with the consent of the parties, "and then only pursuant to rules controlling the district court's review." Id. at 1338.

Finally, suggesting the appropriateness of Supreme Court review, Judge Oakes predicted that the practical problems inherent in review by a district judge of the sterile record of a jury voir dire conducted outside his presence, or in reenacting a juror's interrogation, will lead to numerous difficult appeals "unless and until the Supreme Court decides the constitutional question." Id.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUIT COURTS OF APPEAL CONCERNING THE APPROPRIATENESS UNDER THE FEDERAL MAGISTRATES ACT, ARTICLE III, AND THE DUE PROCESS CLAUSE, OF DISTRICT COURT DELEGATION TO A NON-ARTICLE III MAGISTRATE OF THE CRITICAL FUNCTION OF JURY SELECTION IN A FELONY TRIAL

A. The Reach of the Federal Magistrates Act

In United States v. Ford, the Fifth Circuit prohibited district courts, even with the consent of the parties, from delegating supervision of jury selection in a federal felony trial to a magistrate. 824 F.2d at 1439 n.60. At the same time, the Second Circuit in Garcia sanctioned the practice in that circuit, even over a party's objection, thus aligning the Second Circuit with the Ninth and the First.[4] But even within the Second Circuit there is no uniformity: the practice is used in the Eastern, but not the Southern, District of New York. United States v. Garcia, 848 F.2d at 1338 (Oakes, C.J., dissenting). And those districts, like the Eastern, which permit the procedure, do so "without established rules for determining when voir dire should be assigned and without established procedures for review." Id. See, e.g., Local Rule 1 of the Eastern District's Rules for Magistrates, quoted at p. 4, supra.

The activist efforts of the lower courts to structure a constitutionally-adequate procedure for delegating jury selection to magistrates seek to fill a void left by Congress. The Federal Magistrates Act

4 United States v. Peacock, 761 F.2d 1313 (9th Cir.), cert. denied, ___ U.S. ___, 106 S.Ct. 139 (1985); United States v. Bezold, 760 F.2d 999 (9th Cir. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 811 (1986); United States v. Rivera-Rola, 713 F.2d 866 (1st Cir. 1983) (dictum).

carefully delineates the civil and criminal contexts in which magistrates may exercise delegated authority and the procedures and standards for district court review. It specifies the contexts in which consent by the parties is required. But the act is silent as to whether jury selection in felony trials may be delegated, whether consent is required, whether district court review is available, the procedure for such review, and the standard of review to be applied.

While the Second Circuit in Garcia attributed little significance to this omission from the Congressional scheme, the Fifth Circuit saw the omission as purposeful: Congress did not contemplate that magistrates would conduct this critical, opening stage of a felony trial because it believed such a procedure would violate Article III. Ford, 824 F.2d at 1437. Thus, Ford noted that, in the extensive debate in Congress over the Magistrates Act of 1968,

> ... there was no suggestion that the Act authorized magistrates to conduct the trial of other than petty offenses. The implicit assumption was that magistrates presiding over the trial of felonies was not envisioned, to a certainty -- despite the presence of the additional duty language now said to allow magistrates to preside over jury selection in felony cases. [footnote omitted]

824 F.2d at 1432. Indeed, the assumption was more than "implicit": the bill's sponsor, Senator Tydings, when asked whether the legislation was intended to permit magistrates to try felonies, responded, "No. Absolutely not, but as I say, the Constitution and the laws of the United States preclude that." Hearings Before Subcommittee No. 4 of the House Committee on the Judiciary, 90th Cong., 2d Sess. (March 7, 1968) at 88. See generally, TPO, Inc. v. McMillen, 460 F.2d 348, 352-59 (7th Cir. 1972)(extensive

discussion of legislative history behind Congress's insistence upon consent for magistrates to conduct misdemeanor and civil trials).

In Mingo v. Wedding, 418 U.S. 461 (1974), this Court held that the "additional duty" language did not authorize magistrates to conduct evidentiary hearings in federal habeas corpus cases where the legislative history did not reflect any Congressional intent to overrule the Habeas Corpus Act's requirement that such hearings be conducted by the district judge. Mingo's holding makes "plain that 'additional duty' has never been seen as a primary grant of power." United States v. Ford, 824 F.2d at 1432. "[S]uch a broad reading of congressional purpose would render superfluous the balance of the statute ... Additional duty is a residuum, granting the power to delegate any task not otherwise forbidden after we carve away that congery of duties that Congress never envisioned would be delegated." Id. at 1438.

In response to Mingo, Congress amended the Magistrates Act in 1976 to clarify the specific delegable functions, including presiding at habeas corpus hearings, that magistrates may serve, as well as the procedures and standards for district court review. While placing it in a separate subsection, Congress retained the identical "additional duty" language "without mentioning either the mechanics or the standard for review by a judge of any additional duty assigned to a magistrate [footnote omitted]." United States v. Ford, 824 F.2d at 1434; 28 U.S.C. § 636(b)(3).

Citing a portion of the legislative history, the Second Circuit concluded that the 1976 amendment was intended to permit the district courts to "'remain free to experiment in the assignment of other duties to magistrates

which may not necessarily be included in the broad category of "pretrial matters".'" United States v. Garcia, 848 F.2d at 1329, quoting H.R. Rep. No. 1609, 94th Cong., 2d Sess. 12, reprinted in 1976 U.S. Code Cong. & Admin. News 6162, 6172 [hereafter "House Report"]. But the court omitted the House Report's additional explanation that Congress's purpose was to make "increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties (emphasis added)." House Report, supra. Relying upon this additional insight into the legislative intent, the Fifth Circuit, contrary to the Second, concluded that Congress did not intend to relieve district judges of their "traditional adjudicatory dut[y]" to conduct jury voir dire at a felony trial. United States v. Ford, 824 F.2d at 1435-39.

At the core of the circuit courts' dispute lies a fundamental disagreement about the voir dire's constitutional significance to the trial. While paying lip service to "the importance of jury selection in the context of a trial," the Second Circuit nevertheless concluded: "[E]ven if we accept appellants' premise that an Article III judge must preside over a trial, it does not necessarily follow that for the purposes of Article III trial begins with jury selection." United States v. Garcia, 848 F.2d at 1332. Satisfied that the "availability of de novo review" of unsuccessful "cause" challenges sufficiently safeguarded petitioners' constitutional rights, the court denigrated as an unproven "hypothesis" petitioners' concern that an Article III judge's absence was "somehow demeaning to

potential jurors." Id.§

The Fifth Circuit majority, however, sees the Supreme Court's voir dire-related decisions as "plainly reject[ing] the view that jury selection is a preliminary and essentially ministerial act." United States v. Ford, 824 F.2d at 1435. The Court has "noted the 'long and widely held belief that peremptory challenge is a necessary part of trial by jury.' [Swain v. Alabama, 380 U.S. 202, 219 (1965)]." Id. It has attempted to safeguard this process against a prosecutor's racially discriminatory exercise of peremptory challenges. Batson v. Kentucky, 476 U.S. 79, 88-89 (1986). It has recognized the process as so fundamental to a fair trial that the defendant's Sixth Amendment right to counsel attaches, Brewer v. Williams, 430 U.S. 387, 399 (1977), as does the defendant's right to be present, Lewis v. United States, 146 U.S. 370, 376 (1892), and the public's First Amendment interest in an open trial, Press Enterprise Co. v. Superior Court, 464 U.S. 501 (1984). See, e.g., discussion in United States v. Garcia, 848 F.2d at 1337 (Oakes, C.J., dissenting); United States v. Ford, 824 F.2d at 1435-36 and nn.34-40; Government of the Virgin Islands v. Gereau, 680 F.2d 13, 15 (1st Cir. 1982); F.R.Cr.P. 43(a) ("defendant shall be present ... at every stage of the trial including (emphasis added) the impanelling of the jury").

Thus, the Fifth Circuit's concern about delegating

§ The First Circuit's dictum that magistrates may conduct jury voir dire over the defendant's objection stressed that, in contrast to the voir dire, "preliminary ... jury instructions play an important part in the trial of any case. The jury should not be given the impression that the instructions given it are merely a routine matter of form." United States v. Rivera-Sola, 713 F.2d 866, 874 (1st Cir. 1983). The court's admonition that district judges give preliminary instructions while delegating voir dire reveals its view that the voir dire itself is "routine." In petitioners' case, and in Ford, 824 F.2d at 1437, the magistrate conducted voir dire and gave preliminary instructions.

jury selection to magistrates, even with de novo review of cause challenges, goes far beyond hypothesizing, as the Second Circuit puts it, that jurors will feel "demeaned." The district judge conducting de novo review necessarily will defer to the magistrate due to the "unique importance of sight and sound in the nigh intuitive judgments" of the officer conducting voir dire. United States v. Ford, 824 F.2d at 1436-37, citing Wainwright v. Witt, 469 U.S. 412 (1985). Thus, "de novo review would be difficult and often impossible." Id. at 1437. Accord, United States v. Garcia, 848 F.2d at 1337-38 (Oakes, C.J., dissenting) (quoted at pp. 8-9, supra). Similarly, "a second voir dire or rehearing of testimony [might] never capture the original scene, and carrying a challenged venireman to a second interrogation before the district judge would be a delicate exercise at best [footnote omitted]." Ford, 824 F.2d at 1437.

Ford concluded:

> The trial lawyer knows that who decides the truth from the evidence may be as important as the evidence. The process of selecting the persons to hear the evidence inevitably introduces the trial players to the jury and itself triggers the decisional process. We have secured the rights to the selection process as an essential part of trial by jury and struggled to eliminate bias in its function.
>
> It is then difficult to view jury selection as fit for delegation to magistrates as part of a congressional effort to free judges for performance of their "traditional adjudicatory duty." Rather, we see jury selection as such an integral component of trial that we are not persuaded that Congress envisioned its delegation to magistrates.

824 F.2d at 1437-38.

In view of the conflict in the circuits concerning the reach of the Magistrates Act, the lack of uniform procedures, the issue's importance to the administration of

justice, and the Solicitor General's agreement in Ford that the issue is appropriate for Supreme Court review, the petition for certiorari should be granted.

B. The Constitutional Question

Intertwined with the statutory issue discussed above is the constitutional question whether magistrate-conducted voir dire violates a criminal defendant's Article III and due process rights.[6] Although the Fifth Circuit avoided reaching this issue in Ford, it recognized the presence of "grave constitutional issues." 824 F.2d at 1435. Accord, United States v. Garcia, 848 F.2d at 1337 (Oakes, C.J., dissenting) ("serious constitutional issues").

In Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), the Court held the Bankruptcy Act of 1978 unconstitutional for creating non-Article III tribunals staffed by judges without life tenure or protection under Article III's Compensation Clause, even

6 Although Vallejo's counsel declined to object in the district court to the delegation of voir dire to the magistrate, it is by no means clear, as Justice White has observed, that such a "waiver" "can be dismissed under the plain error doctrine." See p. 7, supra. Parties cannot by consent confer on a tribunal "subject matter jurisdiction beyond the limitations imposed by Article III, § 2." Commodity Futures Trading Commission v. Schor, ___ U.S. ___, ___, 106 S.Ct. 3245, 3257 (1986), citing United States v. Griffin, 303 U.S. 226, 229 (1938). Elsewhere the Magistrates Act reflected congressional concern that "consent" might be coerced and required that such consent be "clear and unambiguous." Archie v. Christian, 768 F.2d 726, 728 (5th Cir. 1985); Horton v. State Street Bank & Trust Co., 590 F.2d 403, 404 (1st Cir. 1979); 28 U.S.C. § 636(c)(2)("neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent..."). "[T]he pressures to acquiesce," Horton, supra, are especially intense for a criminal defendant who faces the prospect of sentencing before the judge who is requesting his consent. This Court might well require a far more rigorous waiver of a defendant's Article III and due process rights than the simple statement by his counsel of "[n]o objection" as occurred in Vallejo's case. See, e.g., Boykin v. Alabama, 395 U.S. 238 (1969); F.R.Cr.P. 11(c)(1).

though the determinations of these tribunals were reviewable on appeal by the circuit courts. On the other hand, the Court recently upheld the consent jurisdiction of the Commodity Futures Trading Commission (CFTC) to adjudicate state law counterclaims in reparation proceedings, Commodity Futures Trading Commission v. Schor, ___ U.S. ___, 106 S.Ct. 3245 (1986), the procedure in the Magistrates Act for delegating to magistrates pre-trial suppression hearings subject to the district court's de novo review, United States v. Raddatz, 447 U.S. 667 (1980), and Congress's establishment of non-Article III courts in the District of Columbia, Palmore v. United States, 411 U.S. 389 (1973).

Article III, § 1, "preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States ..." Schor, ___ U.S. at ___, 106 S.Ct. at 3257. Criminal trials are at the "protected core" of this power. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. at 70 n.25. The Raddatz majority was satisfied that a de novo review procedure carefully crafted by Congress with Article III and due process concerns in mind satisfied the constitutional requirement. But it by no means follows that a similar approach, adopted ad hoc by an activist judiciary to fill a statutory void, suffices in the jury voir dire context. "[T]he issues at stake in a suppression hearing are of a lesser magnitude than those in the criminal trial itself." Raddatz, 447 U.S. at 679.

As the Fifth Circuit concluded, contrary to the Second, jury selection is the opening, and a critically important, stage of the criminal trial. Thus, contrary to the pre-trial suppression hearing, jury selection lies well within Article III's "protected core." The voir dire process is far more delicate and subtle than a suppression

hearing, and therefore far less susceptible to review by a non-participant. See discussion at pp. 8, 13-15, supra. An unsuccessful defendant remains free to argue at trial that the jury should disregard, or the district judge should reconsider whether to exclude, a confession or other evidence that a magistrate, subject to de novo review, has refused to suppress. Raddatz, 447 U.S. at 678 and nn.5-6. But the same defendant must live with the verdict of a jury whose selection the magistrate has supervised and effectively determined. Ford, 824 F.2d at 1437.

An additional danger in the Second Circuit's resolution against petitioners of these constitutional issues is that the court's holding "provides no limiting principle." Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. at 73. If de novo district court review of magistrate-conducted jury selection satisfies Article III and the Due Process Clause, then so would such review of a magistrate's evidentiary and legal rulings or other conduct during the remainder of the trial. Garcia's rejection of a consent requirement does away even with that "constraint against the wholesale delegation of judicial power to adjuncts of the district court" which the same court saw as important, in a civil context, to "ensure that the delegation will not reach a magnitude that would trigger Article III concerns." Collins v. Foreman, 729 F.2d 108, 119 (2d Cir.), cert. denied, 469 U.S. 870 (1984); 28 U.S.C. § 636(c).

CONCLUSION

For the foregoing reasons, petitioners' motions to proceed in forma pauperis, and this petition for certiorari, should be granted.

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APPENDIX

without due process, we have little doubt that the Lupinacci evidence would have been admissible. Connecticut law does not appear to be to the contrary, see *State v. Bryant*, 202 Conn. 670, 688, 522 A.2d 451, 458 (1987) (assuming relevance, "[i]t is always competent for a [defendant] to [present] evidence tending to show that another committed the crime [with] which he is charged") (brackets in original; quoting other Connecticut cases); and state law could not, in any event, diminish Miller's federal constitutional rights.

CONCLUSION

For the reasons above, we conclude that Miller's claim under *Brady v. Maryland* has merit. Accordingly, we reverse the judgment of the district court dismissing Miller's petition and remand for entry of a judgment conditionally granting the writ. The judgment should provide that the writ will be granted unless within a reasonable time the State brings Miller to trial.

UNITED STATES of America, Appellee,

v.

Jose Dauary GARCIA, Damaris Sanchez, William Salazar, Pablo Porras, Diego Chaves-Twiens, Adela Gomez, Reimar Vallejo, Jose Gomez, Jaime Newbold, Yolanda Martinez, Hugo Shanks-Carrera, Defendants,

Diego Chaves-Twiens, Reimar Vallejo, Jose Gomez, Hugo Shanks-Carrera, William Salazar, Defendants-Appellants.

Nos. 238 to 242, Dockets 87-1243 to 87-1246 and 87-1264.

United States Court of Appeals, Second Circuit.

Argued Oct. 19, 1987.

Decided June 1, 1988.

Defendants were convicted in the United States District Court for the Eastern District of New York, Joseph M. McLaughlin, J., of various narcotics-related offenses, and they appealed. The Court of Appeals, Cardamone, Circuit Judge, held that: (1) magistrate could preside over jury selection process in felony prosecution over defendants' objections; (2) refusal to sever was proper; and (3) there was sufficient evidence to support convictions.

Affirmed.

Oakes, Circuit Judge, dissented and filed opinion.

1. United States Magistrates ⇐13

Jury selection delegation by federal district court to magistrate did not violate statute allowing delegation of pretrial matters to magistrates. 28 U.S.C.A. § 636(b).

2. Constitutional Law ⇐78

Statute permitting federal district courts to submit pretrial matters to magistrates did not violate separation of powers doctrine; federal district court judges had discretion in deciding whether to appoint magistrate to preside over jury selection, and de novo review by federal district judge was available regarding composition of jury. U.S.C.A. Const. Art. 3, § 1 et seq.

3. Constitutional Law ⇐78

Federal district court's delegation of task of jury selection in felony prosecution to magistrate over defendants' objections did not violate Article III. U.S.C.A. Const. Art. 3, § 1 et seq.

4. Conspiracy ⇐43(12)

Facts that indictment charged defendant with several drug-related conspiracies and that evidence at trial proved only single conspiracy did not fatally impair defendant's trial.

5. Criminal Law ⇐622.2(1)

Defendants charged with various narcotics-related offenses were not entitled to severance, where all counts in indictment

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concerning non-RICO defendants were charged in RICO count as predicate racketeering acts against other defendants. Fed.Rules Cr.Proc.Rule 8(a), 18 U.S.C.A.

4. Criminal Law ⇐[illegible]

Defendant charged with narcotics racketeering and other drug-related offenses was not entitled to severance due to admission of evidence relating to parties charged in indictment, but who were not tried; evidence was admitted to show breadth of enterprise that formed basis for RICO count and to show defendant's knowledge and intent. Fed.Rules Cr.Proc. Rule 14, 18 U.S.C.A.

7. Criminal Law ⇐622.2(1)

Different degrees of guilt or notoriety among defendants do not mandate separate trials.

6. Criminal Law ⇐622.2(1)

Defendant charged with possession of cocaine with intent to distribute was not entitled to severance of his trial from trials of defendants charged with conspiracy to distribute cocaine and with conducting narcotics racketeering enterprise, given straightforward nature of proof, similarity of charged offenses, and relatively small number of defendants. Fed.Rules Cr.Proc. Rule 14, 18 U.S.C.A.

9. Criminal Law ⇐673(1)

Timing of giving of limiting instruction when physical evidence is admitted for limited purpose is best left to trial court's discretion. Fed.Rules Evid.Rule 105, 28 U.S.C.A.

10. Criminal Law ⇐673(1)

In joint trial for narcotics-related offenses, trial judge's failure to give limiting instructions contemporaneously with admission of each piece of physical evidence did not unfairly prejudice defendant; judge gave limiting instruction in his general charge, and contemporaneous limiting instructions upon admission of co-conspirator statements. F.R.A.P.Rule 105, 28 U.S.C.A.

11. Criminal Law ⇐469

Expert testimony concerning recorded coded telephone conversations between defendants charged with narcotics-related offenses was admissible, where expert simply testified as to jargon of drug trade, and did not interpret or draw conclusions from evidence.

12. Commerce ⇐82.10
Conspiracy ⇐47(12)
Drugs and Narcotics ⇐122(2)

Conviction for narcotics racketeering, illegal interstate travel, possession of cocaine with intent to distribute, and conspiracy to distribute cocaine was supported by evidence that defendant matched physical description of codefendant's partner, defendant was looking for cocaine, and codefendant made telephone calls to defendant as transaction for sale of 50 kilograms of cocaine approached accomplice.

13. Conspiracy ⇐47(12)
Drugs and Narcotics ⇐122(2)

Conviction for conspiracy to possess cocaine with intent to distribute and possession with intent to distribute was supported by evidence that codefendant delivered cocaine in defendant's presence, defendant delivered small amount of cocaine to co-conspirator, and defendant had beeper, $2,000 in cash, and small amount of drugs and drug paraphernalia on his person when he was arrested.

14. Drugs and Narcotics ⇐122(2)

Conviction for possession of cocaine with intent to distribute was supported by evidence that defendant delivered ten kilograms of cocaine.

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Joel B. Rudin, New York City (Maas & Rudin, New York City, of counsel), for defendant-appellant Jose Gomez.

Bert H. Nisonoff, Forest Hills, N.Y., for defendant-appellant Hugo Shanks-Carrera.

Jerald Levine, Jackson Heights, N.Y., for defendant-appellant Diego Chavez-Tesina.

Harry C. Batchelder, Jr., New York City, for defendant-appellant William Salazar.

Sean F. O'Shea, Asst. U.S. Atty., Brooklyn, N.Y. (Andrew J. Maloney, U.S. Atty.,

E.D.N.Y.; John Gleeson and Emily Berger, Asst. U.S. Attys., of counsel), for appellee U.S.

Before OAKES, CARDAMONE and MAHONEY, Circuit Judges.

CARDAMONE, Circuit Judge:

This appeal requires us to decide at what stage in a criminal prosecution a defendant is entitled to the presence of an Article III judge. Appellants urge that a defendant may claim such a right at the commencement of jury selection. There is no doubt that everything has its season, and there is a time when an accused is entitled to the presence of a federal district court judge. But that season does not necessarily come with the commencement of the petit jury selection. In this case, a magistrate presided over the jury selection for the trial of appellants, William Salazar, Diego Chaves-Tesina, Beimar Vallejo, Jose Gomez, and Hugo Shanks-Carrera. They appeal from the May, 1987 judgments of convictions entered against them in the United States District Court for the Eastern District of New York (MacLaughlin, J.) for narcotics-related offenses.

FACTS

Appellants' convictions are the result of an undercover investigation into a major cocaine distribution network in New York and New Orleans conducted by the Drug Enforcement Administration (DEA). DEA Special Agent Rene de la Cova cultivated an acquaintance with Jose Danery Garcia, who introduced de la Cova to the defendant Salazar. Salazar and Garcia sold de la Cova two-eighths of a kilogram of cocaine on January 15, 1986. About three weeks later, de la Cova asked Salazar to supply 50 kilograms of cocaine for one of de la Cova's customers. Salazar mentioned that his business partner, a Colombian of Japanese descent who had lived in London would soon be visiting New Orleans to inspect a large shipment of cocaine. This description matched the defendant Chavez-Tesina, a resident of New York. In New Orleans, another DEA agent, Douglas Krockenberger, was engaged in a separate undercover operation and encountered Chaves-Tesina, who told the agent that he had agreed to deliver cocaine to New York. As de la Cova and Salazar finalized their deal, Salazar made telephone calls concerning it to Chaves-Tesina's residence in New York.

While the large transaction was being arranged, Salazar made or facilitated several other sales of cocaine; only three in particular involved the appellants. On February 6, 1986 Salazar sold one-eighth of a kilogram of cocaine to de la Cova. In another transaction, Salazar contacted the defendant Vallejo and said that he had something "very, very good." Salazar telephoned the defendant Gomez two days later, on March 17, 1986, and asked for "two favors," slang for two kilograms of cocaine, which Gomez agreed to provide. Gomez was seen one hour later carrying a large plastic bag into Salazar's house and later leaving without it. Vallejo was then observed leaving Salazar's house with Salazar. The two drove to Vallejo's house and both entered the house with the bag. Soon thereafter, Salazar exited alone, carrying nothing. Four days later, Vallejo made a small delivery of cocaine to de la Cova and Salazar for their "personal use".

The 50 kilogram deal approached execution. After an agent posing as de la Cova's buyer "flashed" a payment of $1.5 million, Salazar led de la Cova to an apartment in a building that was under surveillance by the DEA. The defendant Shanks-Carrera was observed going inside the building with a duffel bag. When Salazar and de la Cova arrived, Salazar entered the building to make sure that the cocaine was there, while de la Cova waited in the car. When he came out five minutes later, Salazar was arrested. Agents then entered the building and arrested Shanks-Carrera, who was hiding in the apartment closet. Agents recovered the duffel bag, which contained ten kilograms of cocaine—the agreed-upon first installment. Chavez-Tesina and Vallejo were both arrested later that day in Queens, New York.

Several days later Gomez attempted to contact Salazar but instead reached de la Cova, who was carrying Salazar's beeper

after Salazar's arrest. Gomez was arrested after discussing with de la Cova the March 17th transaction between Gomez, Vallejo, and Salazar—and verifying that that transaction involved cocaine—as well as discussing a proposed transaction which he refused to execute without Salazar's permission.

Eleven people, including Garcia, were charged in a 21-count superseding indictment. Six of the defendants were charged for alleged narcotics activities involving Garcia. These defendants never went to trial, some pled guilty, or were severed, or (in one case) fled. The five appellants were tried on nine counts of the indictment, the broadest of which alleged that Salazar and Chaves-Tesina conducted a narcotics racketeering enterprise in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) (1982) (Count 2). Salazar, Chaves-Tesina, and Shanks-Carrera were charged with conspiracy to possess with intent to distribute and possession with intent to distribute 50 kilograms of cocaine under 21 U.S.C. §§ 841, 846 (1982 & Supp. IV 1986) (Counts 19 and 20). All but one of the remaining counts involving the appellants dealt with the three separate smaller sales of cocaine in violation of 21 U.S.C. §§ 841, 846 (1982 & Supp. IV 1986): (1) conspiracy and substantive counts against Garcia and Salazar arising out of the January 15th sale of two-eighths of a kilogram of cocaine (Counts 11 and 12); (2) a substantive count against Salazar arising out of the February 6th sale of one-eighth of a kilogram of cocaine (Count 13); and (3) conspiracy and substantive counts against Salazar, Gomez, and Vallejo arising out of the March 17th sale of two kilograms of cocaine (Counts 15 and 16). Finally, Chavez-Tesina was charged with interstate travel in aid of racketeering under 18 U.S.C. § 1952 (1982 & Supp. IV 1986) (Count 14). Each of the offenses alleged in the non-RICO counts was also charged as a predicate act in the RICO count against Salazar and Chaves-Tesina. Thus, the RICO count incorporated the remaining counts against all of the appellants.

Appellants moved unsuccessfully for severance pursuant to Fed.R.Crim.P. 8(b), 12(b), and 14. After jury selection—presided over by a magistrate—trial commenced on February 17, 1987 and concluded with the appellants convicted as follows: Salazar for narcotics racketeering, distribution of cocaine, possession of cocaine with intent to distribute, and conspiracy to distribute cocaine; Chaves-Tesina for narcotics racketeering, illegal interstate travel, possession of cocaine with intent to distribute, and conspiracy to distribute cocaine; Vallejo and Gomez for conspiracy to possess cocaine with intent to distribute and possession with intent to distribute; and Shanks-Carrera for possession of cocaine with intent to distribute. Shanks-Carrera was acquitted on the conspiracy charge. This appeal followed. We affirm.

DISCUSSION

Appellants collectively and individually raise the myriad of issues common in appeals from multiple defendant trials. Although each will be addressed in turn, the principal issue presented is whether a magistrate—rather than a district court judge—may preside during jury selection:

1 *Jury Selection by a Magistrate*

Judge MacLaughlin assigned the task of jury selection to a magistrate pursuant to local rules for the Eastern District of New York. E.D.N.Y. Magistrates R. 1 ("Full-time magistrates shall have jurisdiction to discharge the duties set forth in 28 U.S.C. Sec. 636."). Salazar, Chaves-Tesina, and Gomez objected to the delegation at the beginning of *voir dire* and Salazar renewed his objection after the jury had been selected. The district judge upheld the delegation, but offered objectants *de novo* review of any challenges to jurors for cause which were not sustained by the magistrate. Because the only juror so challenged had been excused by consent, appellants declined the offer. There is no claim of prejudice from the delegation of the *voir dire* to the magistrate. Rather, appellants argue that allowing a magistrate to preside at the jury selection in a felony case without a defend-

ant's consent contravenes either the Federal Magistrates Act or Article III of the United States Constitution.

A. Statutory Provisions

In 1968 Congress established the office of United States magistrate, which replaced the office of United States commissioner. Federal Magistrates Act, Pub.L. No. 90-578, 82 Stat. 1107, *reprinted in* 1968 U.S. Code Cong. & Admin. News 1280 (codified as amended at 28 U.S.C. §§ 631-639 (1982 & Supp. III 1985)). Controversy soon developed regarding the scope of a magistrate's duties. *See, e.g., Wingo v. Wedding*, 418 U.S. 461, 94 S.Ct. 2842, 41 L.Ed.2d 879 (1974) (magistrates not authorized under the Act to conduct habeas corpus evidentiary hearings). As a result, Congress amended the Federal Magistrates Act in 1976 "to clarify and further define the additional duties which may be assigned to a United States Magistrate in the discretion of a judge of the district court." H.R.Rep. No. 1609, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6162, 6162 [hereinafter 1976 House Report].

As amended, 28 U.S.C. § 636(b)(1)(A)[1] provides that a magistrate may hear and determine pretrial matters—with certain enumerated exceptions—subject to reconsideration by a district judge when it is argued that the magistrate's order is clearly erroneous or contrary to law. Under § 636(b)(1)(B),[2] a magistrate may conduct hearings on specified motions and file proposed findings and recommendations with a district judge. These findings and recommendations are subject to *de novo* determination by a district judge. Finally, § 636(b)(3) provides that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."

Because no contemporaneous objection had been made to the process in *United States v. DeFiore*, 720 F.2d 757, 765 (3d Cir.1983), *cert. denied*, 466 U.S. 906, 104 S.Ct. 1684, 80 L.Ed.2d 158 (1984), we left open the question of whether 28 U.S.C. § 636 permits a district judge to delegate to a magistrate the power to preside over jury selection in felony cases. *Haith v. United States*, 342 F.2d 158, 159 (3d Cir. 1965) (*per curiam*) (failure to object to or claim prejudice from delegation waives right to contest delegation), *aff'g* 221 F.Supp. 495 (E.D.Pa.1964). Here, contemporaneous objections were made and thus the issue is squarely before us.

Our sister circuits are divided on the proper scope of § 636. The Ninth Circuit has held that a magistrate may—consistent with both § 636 and the Constitution—preside over jury selection despite the defendant's objection so long as *de novo* review is available in the district court. *See United States v. Peacock*, 761 F.2d 1313, 1318 (9th Cir.), *cert. denied*, 474 U.S. 847, 106 S.Ct. 139, 88 L.Ed.2d 114 (1985); *United States v. Bezold*, 760 F.2d 999, 1002 (9th Cir.1985),

1. Section 636(b)(1)(A) provides:
(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.
28 U.S.C. § 636(b)(1)(A) (1982).

2. Section 636(b)(1)(B) provides:
(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.
28 U.S.C. § 636(b)(1)(B) (1982). Section 636(b)(1) further provides that
[a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.
Id. § 636(b)(1).

cert. denied, 474 U.S. 1063, 106 S.Ct. 811, 88 L.Ed.2d 786 (1986); *see also United States v. Rivera-Sola*, 713 F.2d 866, 874 (1st Cir.1983) (approving of delegation in dictum). Recently, the Fifth Circuit sitting *en banc* determined that it was not Congress' purpose to permit such a delegation under § 636 and that therefore a magistrate may not preside in jury selection over defendant's protests. *See United States v. Ford*, 824 F.2d 1430, 1438 (5th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 741, 98 L.Ed.2d 776 (1988).

The first issue to be resolved is what was the aim of Congress when it enacted § 636. Discussing the "additional duties" provision of § 636(b)(3), Congress stated that

[t]his subsection enables the district courts to continue innovative experimentations in the use of [magistrates]. At the same time, placing this authorization in an entirely separate subsection emphasizes that *it is not restricted in any way by any other specific grant of authority to magistrates.*

Under this subsection, the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of "pretrial matters".

1976 House Report, *supra*, at 12, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 6172 (emphasis added); *see also* S.Rep. No. 625, 94th Cong., 2d Sess. 10 (1976) (same statement).

Appellants contend that delegation of jury selection to a magistrate is precluded by a close textual analysis of § 636. They first argue that Congress' purpose was to permit only pretrial matters to fall within § 636(b) and that jury selection, as an integral part of a trial, is not a pretrial matter. In support of their argument, appellants note the reference to "pretrial matters" in the House Report quoted above. But the language of that Report plainly states that the subsection grants to district courts the freedom to experiment *beyond* duties traditionally categorized as "pretrial." Hence, even assuming *arguendo* that jury selection falls on the "trial" side of the line between "trial" and "pretrial"—a line that is, at best, often blurred—the legislative history of § 636(b) does not preclude delegation of that task to a magistrate.

Appellants next direct attention to provisions of § 636 that allow magistrates to conduct misdemeanor trials, 28 U.S.C. § 636(a)(2) (1982), and jury or nonjury civil trials, *id.* § 636(c) (1982 & Supp. III 1985), conditioned in each case upon the consent of the parties. As a matter of consistent statutory interpretation, they argue, it cannot have been Congress' objective to allow magistrate selection of juries in felony cases *without* consent of the parties. Yet conditioning the holding of an entire trial before a magistrate on consent is not conclusive in the context of the separate and distinct function of jury selection. Moreover, the legislative history states in so many words that Congress considered the "additional duties" provision to be broad in scope and unrestricted by "any other specific grant of authority to magistrates." Hence, we reject appellants' textual arguments.

[1] We conclude that jury selection delegation to a magistrate is within the scope of § 636(b)(3) and consistent with the Federal Magistrates Act. We are mindful of the familiar canon of construction that requires statutes to be construed so as to avoid constitutional questions. *E.g., Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 106 S.Ct. 3245, 3252, 92 L.Ed.2d 675 (1986). Nonetheless, "this canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication." *Id.* Here, the legislative will is evident. As the Seventh Circuit stated, "The only limitations on section 636(b)(3) are that the duties be consistent with the Constitution and federal laws and that they not be specifically excluded by section 636(b)(1)." *In re Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335, 1340-41 (7th Cir.), *cert. denied*, 444 U.S. 884, 100 S.Ct. 174, 62 L.Ed.2d 113 (1979); *see also Ford*, 824 F.2d at 1441-42 (Rubin, J., dissenting) (only limit on

§ 636(b)(3) is Constitution or conflicting law).

B. Constitutional Concerns

The remaining question is whether Article III of the United States Constitution precludes a magistrate from presiding over jury selection in a felony case without the defendant's consent. Article III, § 1 of the Constitution provides that the "judicial Power of the United States, shall be vested in one supreme court and in such inferior Courts as the Congress may from time to time ordain and establish." Moreover, it provides salary protection and tenure for judges appointed to federal courts in order to ensure that the judicial branch retains its independence from the two other branches of government. There are two aspects to the separation of powers doctrine—a cornerstone of our federal constitutional structure—that are implicated on this appeal. The first addresses the structural relationship between the three branches of government and the second examines the rights secured to individuals by an independent judiciary. *See Schor*, 106 S.Ct. at 3256; *Peacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir.) (en banc) (noting dual components of separation of powers cases), *cert. denied*, 469 U.S. 824, 105 S.Ct. 100, 83 L.Ed.2d 45 (1984).

1. *Relationships Between the Three Branches*

The first, structural component examines the separate and independent relationship between the judiciary and the other two branches of government. *Schor*, 106 S.Ct. at 3256. Although separation of powers refers to the division of the federal government into three separate branches, the branches are not unconnected from each other. James Madison argued that "unless these departments be ... blended as to give to each a constitutional control over the others, the degree of separation ... essential to a free government, can never ... be duly maintained." *The Federalist* No. 48, at 308 (J. Madison) (New American Library ed. 1961).

The concept of "blended" branches has been best capsulized by Justice Jackson, who observed how the Constitution diffused power between the three branches to secure liberty, but at the same time contemplated the integration of the three branches so as to have a workable government: "It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (1952) (Jackson, J., concurring). Each branch does not exist in its own separate, airtight compartment. In determining whether an act of Congress violates the integrity of one branch the question focuses on "the extent to which" the statute prevents that branch "from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443, 97 S.Ct. 2777, 2790, 53 L.Ed.2d 867 (1977). Such an approach implements separation of powers concerns and also the theory of checks and balances—an integral component of the constitutional structure—which serves to prevent each branch from encroaching on the power of the other. *The Federalist*, *supra*, No. 51, at 321-22 (J. Madison).

With this background, we turn first to Congress' purpose. Congress aimed through the Federal Magistrates Act to make federal courts more efficient by the expanded use of magistrates. *See* H.R. Rep. No. 1629, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 4252, 4257; *Federal Magistrates Act: Hearings before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. 81 (1968) (testimony of Sen. Tydings) ("We hope and think that innovative, imaginative judges who want to clean up their caseload backlog will utilize the U.S. magistrates in these areas and perhaps even come up with new areas to increase the efficiency of their courts."). Although laudable, efficiency does not resolve separation of powers concerns, for "'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the

Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government....'" *Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181, 3193-94, 92 L.Ed.2d 583 (1986) (quoting *INS v. Chadha*, 462 U.S. 919, 944, 103 S.Ct. 2764, 2780, 77 L.Ed.2d 317 (1983)).

In the instant case, appellants argue that jury selection is an "inherently judicial" task that cannot be delegated to a non-Article III judge. "[G]uided by the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III,'" *Schor*, 106 S.Ct. at 3256 (quoting *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 105 S.Ct. 3325, 3336, 87 L.Ed.2d 409 (1985)), we examine the effect of such a delegation. The Federal Magistrates Act simply enables a district judge to appoint an additional set of eyes and ears to aid in jury selection. At the same time, magistrates are completely subject to Article III judges because the district judges appoint, 28 U.S.C. § 631(a), remove, *id.* § 631(b), and decide what matters are assigned magistrates, *id.* § 636(b)(4). Significantly, a trial court is not required to appoint a magistrate to preside over jury selection. Rather, the decision is left entirely to the Article III court's discretion. In sum, the delegation of authority here occurs entirely *within* the judicial branch, a circumstance which alleviates greatly the underlying structural separation of powers concern with one branch's *encroaching* upon the power of another. *Cf. United States v. Raddatz*, 447 U.S. 667, 682-83, 100 S.Ct. 2406, 2415-16, 65 L.Ed.2d 424 (1980) (distinguishing administrative agencies from officers of the court).

Even assuming the delegated task itself might be labelled "inherently judicial," Article III concerns are not necessarily implicated when the task is not delegated conclusively to a non-Article III tribunal. *See Raddatz*, 447 U.S. at 681-84, 100 S.Ct. at 2415-17 (upholding suppression hearing referred to magistrate with review); *Mathews v. Weber*, 423 U.S. 261, 271-72, 96 S.Ct. 549, 554-55, 46 L.Ed.2d 483 (1976) (upholding social security benefit cases referred to magistrate with review); *see also Ford*, 824 F.2d at 1444-45 (Rubin, J., dissenting) (rejecting "inherently judicial" argument); *United States v. Saunders*, 641 F.2d 659, 663 (9th Cir.1980), *cert. denied*, 452 U.S. 918, 101 S.Ct. 3055, 69 L.Ed.2d 422 (1981) (same). So long as the "'essential attributes' of judicial power are retained in the Art. III Court," *see Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 81, 102 S.Ct. 2858, 2876, 73 L.Ed.2d 598 (1982) (plurality opinion of Brennan, J.), the delegation of power in a statute does not contravene Article III.

The availability of *de novo* review in this case vested the ultimate decision regarding the composition of the jury with the trial court. Thus, the trial court retained the inherently judicial power to make the final decision. Significantly, retention by an Article III court of this power has been considered crucial in Article III cases. In *Raddatz*, for example, the Supreme Court held that referral of a suppression motion to a magistrate under § 636(b)(1) did not violate Article III or the defendant's due process rights. 447 U.S. at 680-81, 684, 100 S.Ct. at 2414-15, 2416. Distinguishing the question of whether final decisionmaking power on a suppression motion could be delegated to a non-Article III tribunal, *id.* at 681, 100 S.Ct. at 2415, the Court stated that "delegation does not violate Art. III so long as the ultimate decision is made by the district court," *id.* at 683, 100 S.Ct. at 2416. As Justice Blackmun commented, there is little threat to the independence and authority of the judicial branch "when the district judge—insulated by life tenure and irreducible salary—is waiting in the wings, fully able to correct errors." *Id.* at 686, 100 S.Ct. at 2417 (Blackmun, J., concurring); *see also Northern Pipeline*, 458 U.S. at 81-83 (opinion of Brennan, J.) (discussing *Raddatz*); *Mathews*, 432 U.S. at 271, 96 S.Ct. at 554 (final decision remains with judge); Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv.L.Rev. 915, 933 (1988) (advocating theory "that sufficiently searching review of a legislative court's or administrative agency's decisions by a constitutional court

will always satisfy the requirements of article III").

[2] Similarly, the trial judge here was "waiting in the wings" and offered *de novo* review, which the appellants declined. Nor do appellants claim that *de novo* review would have been ineffective. *Raddatz* compels the conclusion that neither delegation of *voir dire* per se nor delegation under the facts of this case erodes the power and independence of the judiciary. Consequently, we perceive no conflict with the first component of the separation of powers doctrine.

2. *Article III Rights*

The second component of the separation of powers doctrine safeguards the rights of litigants vis-a-vis the judicial branch. Litigants have a "right to have claims decided before judges who are free from potential domination by other branches of government." *Schor*, 106 S.Ct. at 3256 (quoting *United States v. Will*, 449 U.S. 200, 218, 101 S.Ct. 471, 482, 66 L.Ed.2d 392 (1980)). This component most often arises in the context of a litigant's consenting to a non-Article III forum. *E.g., Schor*, 106 S.Ct. at 3256–67; *Peacemaker Diagnostic*, 725 F.2d at 541–42. Here, appellants affirmatively objected to the delegation of *voir dire* to a magistrate, thereby rendering of greater import the second component of the doctrine. In cases where consent is absent the second component requires us to view a delegation of jurisdiction from the perspective of the individuals whose liberty is secured by our tripartite system of government. Although many of the same considerations are necessarily at play in both components of the separation of powers doctrine and although both serve to protect the single overall mission of Article III, *cf. Schor*, 106 S.Ct. at 3266 (Brennan, J., dissenting) ("In my view, the structural and individual interests served by Article III are inseparable."), each emanates from a different perspective.

[3] Applied to the instant case, the second component of the doctrine ensures that whatever right a litigant has to the presence of an Article III judge is effectively safeguarded when jury selection is delegated to a magistrate. While not minimizing the importance of jury selection in the context of a trial, we decline to hold that Article III requires the physical presence of an Article III judge at that precise point in the adjudicatory process. Historically a judge was not required to be present during *voir dire* or to hear challenges for cause. *See Ford*, 824 F.2d at 1447 (Rubin, J., dissenting). Appellants argue that an Article III judge is required to be present at trial and refer to cases indicating that trial begins with jury selection. The cases cited focus on a defendant's right to be present at jury selection, *see, e.g., Lewis v. United States*, 146 U.S. 370, 373–74, 13 S.Ct. 136, 137–38, 36 L.Ed. 1011 (1892), or on when a trial begins for purposes of the Speedy Trial Act, *see, e.g., United States v. A-A-A Elec. Co.*, 788 F.2d 242, 246 (4th Cir.1986), rather than on a right to an Article III judge. Hence, they are inapposite. The point at which trial begins and particular constitutional protections attach can vary with the individual right involved. *Cf. Press-Enterprise Co. v. Superior Court of Calif.*, 464 U.S. 501, 509 n. 3, 104 S.Ct. 819, 823 n. 3, 78 L.Ed.2d 629 (1984) (double jeopardy). Thus, even if we accept appellants' premise that an Article III judge must preside over a trial, it does not necessarily follow that for purposes of Article III trial begins with jury selection.

The availability of *de novo* review alleviates apprehension that a litigant will be deprived of the tangible benefits ensured by a judicial branch that is separate and independent from the remaining two branches of government. Tacitly acknowledging this point, appellants argue that the lack of an Article III judge's physical presence at *voir dire* is somehow demeaning to potential jurors. We decline to adopt this debatable hypothesis as a justification for a broad constitutional rule.

In sum, we hold that even absent a defendant's consent the Federal Magistrates Act permits district courts to delegate the task of jury selection in felony cases to a magistrate. Additionally, such a delegation does not contravene Article III of the

Constitution where, as here, the district court affords *de novo* review of unsustained challenges to jurors for cause.

II *Single or Multiple Conspiracy*

Salazar argues that the indictment charged him with several conspiracies and that he was prejudiced because the evidence at trial proved only a single conspiracy. The issue of the government's indicting for single versus multiple conspiracies arises frequently in criminal jurisprudence. *See, e.g., Kotteakos v. United States*, 328 U.S. 750, 755, 66 S.Ct. 1239, 1243, 90 L.Ed. 1557 (1946) (convictions reversed because single conspiracy charged, multiple conspiracies proven); *United States v. Nersesian*, 824 F.2d 1294, 1302–03 (2d Cir.) (evidence properly supported single conspiracy charge), *cert. denied*, — U.S. —, 108 S.Ct. 357, 98 L.Ed.2d 382 (1987); *United States v. Miley*, 513 F.2d 1191, 1205–07 (2d Cir.), *cert. denied*, 423 U.S. 842, 96 S.Ct. 74, 46 L.Ed.2d 62 (1975); *United States v. Borelli*, 336 F.2d 376, 378 (2d Cir.1964), *cert. denied*, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965). Instead of arguing that the government charged a single conspiracy but proved multiple, unrelated conspiracies—a recurring problem on appeal—Salazar contends that the reverse situation fatally impaired his trial.

[4] We disagree. Multiple conspiracies exist "unless the evidence of the scale of the operation permit[s] the inference that the persons at a particular level must have known that others were performing similar roles." *Miley*, 513 F.2d at 1207. The record is devoid of evidence indicating this quantum of knowledge among appellants while involved in the acts that led to their convictions. In fact, were this a case where the government had charged a single conspiracy, we would be hard pressed to find evidence supporting a jury determination that a single conspiracy actually did exist. *Cf. Nersesian*, 824 F.2d at 1302 (analyzing evidence in conspiracy case). Having previously admonished the government that it must "cease combining in an alleged single conspiracy, criminal acts loosely, if at all, connected," *United States v. Bertolotti*, 529 F.2d 149, 151 (2d Cir. 1975), we should not treat the fact that it heeded such advice in this case with stone-faced indifference. Here, the trial court's failure to charge the jury on single versus multiple conspiracies was not error and Salazar's contrary contention is unpersuasive. This does not mean, of course, that the government may arbitrarily jointly try defendants alleged to have engaged in unrelated conspiracies, for the rules governing joinder and severance still apply.

III *Joinder and Severance*

[5] Salazar, Shanks-Carrera, Vallejo, and Gomez object to the trial court's denial of their motions for severance. It should be noted initially that all of the counts in the indictment concerning the non-RICO appellants were charged also in the RICO count as predicate racketeering acts against Salazar and Chavez-Tezina. Joinder of these defendants in the same indictment was therefore proper under Fed.R.Crim.P. 8(b), even though multiple conspiracies were charged and even though some defendants were not named in all the conspiracy counts, which also constituted RICO predicate offenses, or in the overarching RICO count. *See United States v. Burton*, 647 F.2d 234, 239–40 (2d Cir.), *cert. denied*, 454 U.S. 857, 102 S.Ct. 307, 70 L.Ed.2d 152 (1981); *United States v. Weisman*, 624 F.2d 1118, 1129 (2d Cir.), *cert. denied*, 449 U.S. 871, 101 S.Ct. 209, 66 L.Ed.2d 91 (1980); *United States v. Gallo*, 668 F.Supp. 736, 748 (E.D.N.Y.1987), *mandamus granted on other grounds*, 834 F.2d 283 (2d Cir.1987); *United States v. Castellano*, 610 F.Supp. 1359, 1396–97 (S.D.N.Y.1985). The only question is whether denial of the Fed.R.Crim.P. 14 motions for severance from the joint trial was a clear abuse of the trial court's discretion. *Nersesian*, 824 F.2d at 1303.

A. Salazar

[6] The essence of Salazar's argument for severance encompasses the issues of proper joinder under Rule 8(b) and of single versus multiple conspiracies. These arguments were rejected above and need not

be discussed further. Salazar also contends that he was prejudiced by the admission of conspiracy evidence that related to parties charged in the indictment, but who were not tried. This is not a *severance* argument—as appellant contends—but rather a *relevance* argument. The trial court admitted the evidence on the ground that it was relevant to show the breadth of the "enterprise" that formed the basis for the RICO count and to show Salazar's knowledge and intent, which he had put in issue. The weighing of relevance against prejudice to see where the balance tips is entrusted to the discretion of the trial court. Salazar does not argue that the trial court acted arbitrarily or irrationally. *See United States v. Rodolfo*, 769 F.2d 104, 108 (2d Cir.), *cert. denied*, 474 U.S. 923, 106 S.Ct. 253, 88 L.Ed.2d 264 (1985). Hence, the denial of the severance motion must stand.

B. Shanks-Carrera

[7] Shanks-Carrera urges that the denial of a severance in his case created unfair prejudice, correctly claiming that he was the least implicated in the broad series of transactions that form the nexus of this prosecution. Different degrees of guilt or notoriety among defendants obviously do not mandate separate trials. *Nersesian*, 824 F.2d at 1304. Further, that Shanks-Carrera was acquitted on the conspiracy count is a strong indication that the jury was capable of separately evaluating each defendant's culpability and that there was no prejudicial "spillover" of evidence. *See, e.g., Weisman*, 624 F.2d at 1130.

[8] In addition, the relatively small number of defendants, the straightforward nature of the proof, the similarity of the charged offenses, and the short trial all support the trial court's determination that the jury was able fairly to weigh the evidence against each defendant. Nor can it be said that the trial court's denial of Shanks-Carrera's motion for severance resulted in "a miscarriage of justice." *United States v. Bari*, 750 F.2d 1169, 1177 (2d Cir.1984), *cert. denied*, 472 U.S. 1019, 105 S.Ct. 3482, 87 L.Ed.2d 617 (1985). We therefore affirm the denial of Shanks-Carrera's motion for severance.

C. Vallejo and Gomez

For the reasons discussed above concerning Shanks-Carrera's motion for severance, we also affirm the denial of Vallejo's and Gomez's motions for severance.

IV *Evidentiary Issues*

A. Rule 105 Limiting Instructions

Vallejo and Gomez assert that the failure to grant a severance coupled with the trial court's limiting instructions unduly impaired their trial. The trial court denied Vallejo's and Gomez's requests that limiting instructions be given contemporaneously with the admission of each piece of physical evidence, delimiting which defendant(s) the evidence was admissible against. Judge McLaughlin did give contemporaneous limiting instructions when coconspirator statements were admissible against some—but not all—defendants. In addition, the trial court gave a general instruction to the jury in his charge:

> Some of the charges in this case have been made against some of the defendants and not against others. You must decide what the evidence shows about each defendant without considering any evidence that may have been received solely against some other defendant or defendants.
>
> Each defendant is entitled to have the case against that defendant decided solely on the evidence and the law that applies to him.

Appellants argue that Fed.R.Evid. 105, which provides that "when" evidence is admissible against one party but not another, the court "shall" instruct the jury as to the limited admissibility, requires that instructions accompany every exhibit at the time admitted. Although there is some support for the proposition that Rule 105 mandates a contemporaneous limiting instruction when any type of evidence is admitted for a limited purpose, *see* 21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5065 (1977 & Supp.1987),

the weight of authority is to the contrary. *See United States v. Carson*, 702 F.2d 351, 363 (2d Cir.) (trial court instructed jury on numerous occasions to accord each defendant separate consideration; no mention of contemporaneous instruction), *cert. denied*, 462 U.S. 1108, 103 S.Ct. 2457, 77 L.Ed.2d 1335 (1983); *United States v. Losada*, 674 F.2d 167, 171–72 (2d Cir.) (instructions in charge alone adequately protected against prejudice), *cert. denied*, 457 U.S. 1125, 102 S.Ct. 2945, 73 L.Ed.2d 1341 (1982); *see also* 1 J. Weinstein, *Weinstein's Evidence* ¶ 105[05], at 105–44 (1988) ("The jury may be instructed either as the [limited] evidence is admitted *or as part of the general charge.*") (emphasis added; footnote omitted).

[9] The timing of Rule 105 limiting instructions with regard to physical evidence is best left to the trial court's discretion. *See United States v. Oxford*, 735 F.2d 276, 280 (7th Cir.1984); *United States v. Dubish*, 708 F.2d 240, 243 (6th Cir.1983). Accordingly, the record must be examined to ascertain whether Vallejo and Gomez suffered any harm from the trial court's refusal to give contemporaneous limiting instructions when admitting each piece of physical evidence that was not relevant to them. *See Losada*, 674 F.2d at 171–72 (looking for prejudice); *Weisman*, 624 F.2d at 1130 (same); *United States v. Toliver*, 541 F.2d 958, 963 (2d Cir.1976) (same).

[10] We conclude that Judge McLaughlin's limiting instruction in his general charge, together with his contemporaneous limiting instructions upon the admission of coconspirator statements, adequately protected appellants. Where, as here, there are a limited number of defendants, the jury is able more easily to separate the evidence admitted against each of them. *See United States v. Tettler*, 802 F.2d 606, 617 (2d Cir.1986). Further, the evidence admitted without contemporaneous instructions was physical evidence that lent itself to compartmentalized consideration. *See, e.g., Toliver*, 541 F.2d at 963 (documents). As a consequence, the refusal of the court to give contemporaneous limiting instructions at each introduction of evidence with limited admissibility did not unfairly prejudice Vallejo and Gomez.

B. DEA Expert Testimony

[11] Appellants object to the admission of a DEA expert's testimony concerning the meaning of certain recorded coded telephone conversations between them. Such testimony is subject to challenge only when the expert interprets and draws conclusions from the evidence instead of simply testifying as to the jargon of the drug trade. *See Nersesian*, 824 F.2d at 1308; *United States v. Brown*, 776 F.2d 397, 400–01 (2d Cir.1985), *cert. denied*, 475 U.S. 1141, 106 S.Ct. 1788, 90 L.Ed.2d 339 (1986); *United States v. Young*, 745 F.2d 733, 760–61 (2d Cir.1984), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1842, 85 L.Ed.2d 142 (1985). Appellants do not allege that the agent's testimony included his interpretations or conclusions. This claim is therefore also without merit.

C. Sufficiency of the Evidence

Chavez-Tosino, Vallejo, and Shanks-Carrera contend that there is insufficient evidence to support their convictions. It is a familiar litany that the standard for appellate review of an insufficiency claim places a "very heavy burden" on the appellant. *Losada*, 674 F.2d at 172. Our inquiry is whether the jury, drawing reasonable inferences from the evidence, may fairly and logically have concluded that the defendant was guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 317, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560 (1979); *United States v. Barnes*, 604 F.2d 121, 157 (2d Cir.1979), *cert. denied*, 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 260 (1980). In making this determination, the evidence must be viewed in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), and all permissible inferences construed in its favor. *United States v. Dazzo*, 672 F.2d 284, 288 (2d Cir.), *cert. denied*, 459 U.S. 836, 103 S.Ct. 81, 74 L.Ed.2d 77 (1982). In addition, the "[e]xistence of and participation in a conspiracy with the requisite criminal in-

OAKES, Circuit Judge (dissenting):

I respectfully dissent.

I agree with the majority of the judges in the Fifth Circuit sitting en banc that, at the very least, the practice of permitting magistrates to conduct jury voir dire in felony cases raises serious constitutional questions. *See United States v. Ford*, 824 F.2d 1430 (5th Cir.1987) (en banc), *cert. denied*, — U.S. —, 108 S.Ct. 741, 98 L.Ed.2d 776 (1988). Selection of a petit jury to try a felony case has both particular and systemic importance; it implicates not only the defendant's Fifth and Sixth Amendment rights and provides the foundation upon which the remainder of the trial is built, but is essential, as Judge Patrick Higginbotham reminded us, "because the impartiality of the adjudicator goes to the very integrity of the legal system." *Id.* at 1435 (quoting *Gray v. Mississippi*, — U.S. —, 107 S.Ct. 2045, 2056, 95 L.Ed.2d 622 (1987)). The process of voir dire is especially significant; not only is the peremptory challenge a necessary part of trial by jury, *Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759 (1965), but the prosecutor's use of peremptory challenges may violate other constitutional requirements. For example, a prosecutor's challenges based on race implicate the Equal Protection clause. *Batson v. Kentucky*, 476 U.S. 79, 88–89, 106 S.Ct. 1712, 1718–19, 90 L.Ed.2d 69 (1986). And, while double jeopardy does not attach until the jury is sworn, *Crist v. Bretz*, 437 U.S. 28, 35, 98 S.Ct. 2156, 2160, 57 L.Ed.2d 24 (1978), the Sixth Amendment rights of a defendant to a speedy and public trial, *accord* Speedy Trial Act, 18 U.S.C. §§ 3161–3174 (1982 & Supp. IV 1986), to be present while a jury is selected, *Lewis v. United States*, 146 U.S. 370, 376, 13 S.Ct. 136, 138, 36 L.Ed.2d 1011 (1892); *United States v. Crutcher*, 405 F.2d 239, 242–43 (2d Cir. 1968), *cert. denied*, 394 U.S. 908, 89 S.Ct. 1018, 22 L.Ed.2d 219 (1969); Fed.R.Crim.P. 43(a), and to the assistance of counsel during jury selection, *see Brewer v. Williams*, 430 U.S. 387, 399, 97 S.Ct. 1232, 1239, 51 L.Ed.2d 424 (1977), all attach before or at the time jury selection begins. Since the whole purpose of voir dire is to obtain an impartial jury, one that is "capable and willing to decide the case solely on the evidence before it," *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 946, 71 L.Ed.2d 78 (1982), it follows that the right to such a jury attaches from the beginning of the selection process.

Are these constitutional concerns met by the district judge's power to conduct a de novo review of the voir dire process, here specifically reserved but not utilized? Does that power satisfy the constitutional concerns above noted? The answer, I feel, is at best maybe. The district court's review of a magistrate's rulings on challenges would surely be difficult, as Judge Higginbotham pointed out in *United States v. Ford*, 824 F.2d at 1436–37, and would undoubtedly lead to appeals on the issue to circuit courts. Perhaps the district court has the inherent power simply to conduct a voir dire a second time. *See United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). But this approach presents serious practical problems; for example, the second interrogation of a potential juror would be likely to put that individual on the defensive, making a reenactment of the original voir dire impossible. *See United States v. Ford*, 824 F.2d at 1437; *but see id.* at 1446 (Rubin, J., dissenting). In any event, no clear-cut answer can be forthcoming unless and until the Supreme Court decides the constitutional question.

The practice of delegating jury selection to a magistrate, absent the consent of the defendant and the Government, is to my mind a bad one. Intending no offense toward magistrates, delegation demeans the process, making it appear essentially clerical in nature. At the very least it impedes the judge from personally instilling in the jury at the start of the trial a sense of the importance of the work the jury is about to perform. It is apt to make the jury less attentive to the judge during the trial, and the judge less sensitive to the problems of the individual jurors, as well as to the overall chemistry of the jury itself. For due process also demands, as well as a disinterested jury, "a trial judge ever

watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. at 217, 102 S.Ct. at 946. Events can occur during the magistrate's voir dire that would require the judge's review, but he would be disadvantaged because they occurred outside his presence. In addition, a defendant might feel shortchanged, and left with the impression that he, and his case, are of lesser consequence because the judge himself did not participate. The Constitution instructs us that every criminal defendant, regardless of his status in the community or the nature of the crimes with which he is charged, is important and entitled not only to the best practicable process but also entitled reasonably to feel as if he has received the fairest practicable process.

I cannot think that the practice—at least in a jurisdiction such as the Eastern District of New York where the judge, rather than the attorneys, conducts the voir dire—is one that can save much judicial time. It is a practice that is not followed in the Southern District of New York, and in the districts in which it is used it is exercised without established rules for determining when voir dire should be assigned and without established procedures for review. I would, in the exercise of our supervisory power, prohibit it except, possibly, when the parties consent, and then only pursuant to rules controlling the district court's review. By so doing, I would incidentally avoid the problems of statutory and constitutional interpretation that my colleagues solve with a sweep that leaves me, as I suggest, unconvinced. I therefore dissent.

Shirley WILDER, et al.,
Plaintiffs-Appellees,

v.

Blanche BERNSTEIN, Individually and as Administrator of the New York City Human Resources Administration, et al., Defendants-Appellees,

Abbott House, et al.,
Intervenors-Appellees,

Paula Rabinow, Individually and as Director of the Joint Planning Service, et al., Appellants.

Nos. 1684, 1685 and 1686, Dockets 87-7685, 87-7688 and 87-7410.

United States Court of Appeals, Second Circuit.

Argued June 24, 1987.

Decided June 8, 1988.

Certified class of black Protestant children sued for declaratory and injunctive relief, arguing that city's statutory scheme for provision of child care services violated their establishment and free exercise rights, their rights to equal protection and due process, and Title VI of the Civil Rights Act. Settlement was proposed on behalf of plaintiff class and some foster care agencies objected. The United States District Court for the Southern District of New York, 645 F.Supp. 1292, Robert J. Ward, J., initially approved the settlement subject to compliance with conditions, and after final judgment ruling that conditions had been met, objecting foster care agencies, which had been dismissed as parties when settlement was approved, appealed. The Court of Appeals, Jon O. Newman, Circuit Judge, held that settlement, providing for placement of children in foster care homes on first-come, first-served basis, did not violate New York's constitutional and statutory provisions for religious matching of child with child care services, did not infringe free exercise of religion rights of parents and children, and did not violate religious establishment clause.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 4th day of August one thousand nine hundred and eighty- eight

UNITED STATES OF AMERICA,
Appellee,

-v.-

JOSE DANERY GARCIA, DAMARIS SANCHEZ, WILLIAM SALAZAR, FABIO PORRAS, DIEGO CHAVEZ-TESINA, ADELA GOMEZ, BEIMAR VALLEJO, JOSE GOMEZ, JAIME NEWBOLD, YOLANDA MARTINEZ, HUGO SHANKS-CARRERA,
Defendants,
DIEGO CHAVEZ-TESINA, BEIMAR VALLEJO, JOSE GOMEZ, HUGO SHANKS-CARRERA, WILLIAM SALAZAR,
Defendants-Appellants.

UNITED STATES COURT OF APPEALS
FILED
AUG 4 1988
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

Docket Nos 87-1243, 87-1244, 87-1245, 87-1246, 87-1264

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants WILLIAM SALAZAR, HUGO SCHANKS-CARRERA, and JOSE GOMEZ.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED. Judge Oakes dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

86 CR 266

Plaintiff,

-against-

JOSE GOMEZ, ET AL.,

Defendants.

----------x

U.S. Courthouse
Brooklyn, N.Y.

February 9, 1987

JURY SELECTION BEFORE A. SIMON CHREIN,
CHIEF MAGISTRATE

APPEARANCES:

FOR THE PLAINTIFF
SEAN O'SHEA, ESQ., AUSA

FOR DEFENDANT SALAZAR
HARRY BATCHELDER, ESQ.

FOR DEFENDANT TESINA
JERRY LEVINE, ESQ.

FOR DEFENDANT VALLEJO
FREDERICK MILLER, ESQ.

FOR DEFENDANT GOMEZ
PAUL WARBURGH, ESQ.

FOR DEFENDANT CARSERA
BURT NISINOFF

FRED LORBER, CSR
OFFICIAL COURT REPORTER
718 330 2168

THE COURT: Ready to start, gentlemen?

MR. O'SHEA: We are missing a chair.

THE COURT: Take a chair from another table. Is that a major logistical problem? Let me swear the interpreters. Are both interpreters here?

R. VAN NORMAN WHITFORD and JOSE A. MONTALDO, were duly sworn as interpreters by the Court.

THE COURT: Gentlemen, I understand that when the question was posed to some or all of the defendants as to whether or not they wished to consent to a Magistrate selecting the jury, with the understanding that the case would nonetheless be tried by an Article 3 Judge, that some defendants have objected to the procedure of a Magistrate jury selection. Is that correct?

MR. WARBURGH: That is my understanding, yes.

THE COURT: Do all of the defendants object, or just some?

MR. LEVINE: On behalf of my client, he objects to the jury selection before the Magistrate.

MR. BATCHELDER: On behalf of Mr. Salazar, Mr. Salazar objects, Your Honor.

THE COURT: Do any other defendants object to a Mag istrate selecting the jury?

MR. WARBURGH: I need an interpreter. Mr. Gomez objects.

THE COURT: Thatleaves me with just two additional--

MR. MILLER: Let's have a severance and we will try our own case.

THE COURT: I am not talking about a severance. Mr. Salazar has objected, is that correct, Mr. Batchelder?

MR. BATCHELDER: That is correct, sir.

THE COURT: Mr. Levine, Mr. Tesina has objected?

MR. LEVINE: I did that originally, Judge.

MR. MILLER: No objection.

THE COURT: Mr. Warburgh, your client has objected?

MR. WARBURGH: Mr. Gomez objected.

THE COURT: Mr. Nisinoff?

MR. NISINOFF: He has not objected, Your Honor.

THE COURT: Mr. O'Shea, what is the government's view as to whether we can proceed?

MR. O'SHEA: Your Honor, I believe the view that you espoused earlier in your own courtroom, that the selection of the jury by yourself, the Magistrate, is perfectly proper. The government's position is that we should proceed with the jury selection.

THE COURT: I intend to proceed with the selection. In the event Judge McLaughlin decides that he

would prefer to select the jury, either on his own initiative or at the request of any counsel, inasmuch as no juror will be sworn as a trial juror, they will, of course be sworn for the voir dire, there would be no jeopardy. There would be no prejudice and Judge McLaughlin would be free to discharge whatever jury we select today.

My own view of the matter is that the selection of the jury, even over the objection, or without the consent of the defendants has been approved in other matters within this Circuit.

Yes, Mr. Batchelder?

MR. BATCHELDER: Do I understand it that the Second Circuit has passed on the propriety of Magistrates over the objection, or whether--

THE COURT: No, they have approved the procedure, my understanding is.

MR. BATCHELDER: They have not, as I understand it, approved the procedure if the defedant wishes to, because the Magistrate Act has been construed narrowly not to confer that power, as I understand it.

THE COURT: Mr. Batchelder, what I have indicated I will do, unless both sides object, is to proceed to select the Jury and you can raise whatever objection to the panel selected and to the manner of its selection before Judge McLaughlin on the 17th when the trial begins.

If JUdge McLaughlin or in fact I would ask that you bring it to Judge McLaughlin's attention at the close of this selection process. If he chooses to select the jury by himself, then he is free to do so.

MR. BATCHELDER: Your Honor, I don't--

THE COURT: You have your exception.

MR. BATCHELDER: I realize I am as anxious as Your Honor to bring this matter to a conclusion, but in defense of my client's interests, Your Honor, I think it would be a brave person, Judge McLaughlin included, who after having wasted three, four hours of what we are doing here, to automatically say, no, I don't think Magistrate Chrein has the power, so therefore, we are going to go ahead.

I am submitting if my client objects to jurisdiction, as I understand the Magistrate Act, unless my client consents, and you do not have jurisdiction to do what we are about to embark on, and that is all the record I am making.

THE COURT: Does anybody feel that some inquiry should be posed to Judge McLaughlin now?

MR. MILLER: Judge--

THE COURT: I see no need for such an inquiry. I believe the matter has been dealt with. I don't think there was a specific central issue to any case, but jury selections by Magistrates have been approved in both this

Circuit and other Circuits. I unfortunately do not have the cases at my fingertips at this point.

MR. O'SHEA: I don't have the cases either, Your Honor. But I believe you are correct. I have no objection, however, if the Court wishes to inquire of Judge McLaughlin what he would like to do at this point. It is entirely up to the Court.

THE COURT: Mrs. Culman, can you get me Judge McLaughlin's law clerk on the phone?

THE CLERK: Yes, sir.

THE COURT: In fact, I am going into chambers and deal with it myself. Are they getting somebody? I will speak to him. They are coming in. Yes, Mr. Warburgh?

MR. WARBURGH: We have one interpreter in the Courtroom.

THE COURT: There is a machine.

MR. WARBURGH: Yes, I understand. There came a time here when I needed an interpreter to speak to my client briefly, privately, and he had to stop doing what he was doing to come over and aid me. I don't think it is important now during jury selection process.

THE COURT: Then I will make a note of that and we will tell the Judge. You can raise that with Eileen Levine before the trial. All right, I am going to proceed to select the Jury. Judge McLaughlin's view of the law was

the same as mine. Those parties that object, and we have recorded on the record who has objected and who has consented, that those parties who object are deemed to have an objection. I assume the ground is that jury selection being part of the trial, and a Magistrate not being permitted even with waiver to try a felony case, that this is a part of the trial and the parties insist that all aspects of the trial or those objecting parties insist that all aspects of the trial be conducted by an Article 3 Judge, your exception is noted and when the jury comes up we will proceed to pick the jury.

I would ask that any friends or relatives or spectators stay within the first two rows on the right side of the room. I intend to fill the remainder with prospective jurors. So if any of you have, if there are any spectators or people who are not prospective jurors, sit in the first row alone where the three people are seated now.

MR. NISINOFF: Stay right there.

THE COURT: Fill up my right side first. Are those two gentlemen deputy marshals?

A VOICE: Yes, sir.

THE COURT: Could you possibly position yourself over those two benches. I intend to use those benches for prospective jurors. There must be an extra chair or two thatyou can use. Have you phoned for the jurors yet?

Nos. 88-5014; 88-5158

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOSE GOMEZ, DIEGO CHAVEZ-TESINA,
WILLIAM SALAZAR and BEIMAR VALLEJO, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

CERTIFICATE OF SERVICE

I, Joel B. Rudin, a member of the Bar of this Court, hereby certify that on the 30th day of September, 1988, one copy of the Petition for Writ of Certiorari in the above-entitled case was mailed, first class postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, counsel for respondent herein. I further certify that all parties required to be served have been served.

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